

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 20, 2002

**STATE OF TENNESSEE v. BERNITA HOGAN**

**Direct Appeal from the Circuit Court for Dickson County**  
**No. CR-1358     Allen W. Wallace, Judge**

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**No. M2002-00808-CCA-R3-CD - Filed April 4, 2003**

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The defendant, Bernita Hogan, appeals the trial court's revocation of her probation for nonpayment of restitution, raising the sole issue of whether the trial court abused its discretion in revoking her probation when the record fails to show that her nonpayment was willful. The State responds by arguing that the record supports the trial court's finding that the defendant's nonpayment of restitution was in fact willful, rather than the result of any inability to pay. Based on our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and JOE G. RILEY, JJ., joined.

William B. Lockert, III, District Public Defender, and Chris L. Young, Assistant District Public Defender, for the appellant, Bernita Hogan.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Suzanne M. Lockert, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

The defendant pled guilty on May 13, 1994, to theft, a Class C felony, apparently based on her utilization of her position as administratrix to steal from her late mother's estate. From what we have been able to glean from the sparse record on appeal, she was sentenced as a Range I, standard offender to four years in the Department of Correction, with the trial court suspending the sentence and placing her on four years of supervised probation. Under the terms of her probation, the defendant was ordered to pay a total of \$7,314 in restitution and court costs, beginning with an initial payment of \$50 on June 13, 1994. The defendant's probation was apparently revoked in 1998 and

then reinstated, which resulted in the defendant's four-year probation term beginning anew. At that time, the trial court also apparently reduced her monthly restitution payment to \$30.<sup>1</sup>

On October 22, 2001, a probation violation warrant was issued against the defendant, alleging that she had not made any restitution payments since May 2, 2001, and owed a total of \$6,438.97. A probation revocation hearing was held before the Dickson County Circuit Court on March 25, 2002. Catherine Stringfield, the defendant's probation officer, testified that the defendant had been ordered to pay \$50 per month when initially placed on probation in 1994. She had been charged with violation of probation in 1998 and, as a result, the court had placed her on probation again for another four years.<sup>2</sup> Ms. Stringfield testified that the last payment the defendant had made was a \$25 payment on March 22, 2002, and that she had also made a \$25 payment on October 24, 2001. She confirmed that, since 1994, the defendant had paid a total of only \$642 of the \$7,000 in restitution that she had been ordered to pay.<sup>3</sup>

Ms. Stringfield testified that her records showed that the defendant had been employed at a business called Shiloh from July through September of 2001, had been unemployed from October 2001 through February 2002, and had begun a new job at Fiesta Grill on March 4, 2002. The defendant had reported to her each month during her employment at Shiloh, but had not made any

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<sup>1</sup>The defendant's original probation order is included in the record, but there is no documentation relating to her 1998 probation revocation hearing and/or the reduction of her monthly restitution payments. The original 1994 probation order lists the following special condition: "[t]o pay \$7000 restitution and court cost in full. \$7314.00 begin payment of \$50.00 on 6-13-94." Tennessee Code Annotated section 40-35-304 provides in part that when a trial court directs a defendant to pay restitution to the victim of a crime as a condition of probation, it "shall specify at the time of the sentencing hearing the amount and time of payment . . . and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense." Tenn. Code Ann. § 40-35-304(c)(1997). We note that it would have been impossible for the defendant to pay the full amount of restitution and court costs during her four-year probationary term at the rate of only \$50 per month. However, there is nothing in the record to indicate whether the trial court intended that the defendant's monthly payments remain at only \$50 per month for the duration of her probationary term, or that her payments extend beyond her four-year probationary period.

<sup>2</sup>Although both Ms. Stringfield and the trial court referred to the defendant's probation as having been "extended" for four years, it is apparent from the defendant's later testimony that what actually occurred in 1998 was that the trial judge revoked her probation and ordered her to begin service of her four-year sentence of incarceration, but then changed his mind, suspending the sentence again and reinstating her original four-year probationary term, which began anew from that point. See State v. Hunter, 1 S.W.3d 643, 644 (Tenn. 1999) (concluding that a trial court may repeatedly revoke and reinstate defendant's probation, causing probationary term to begin anew, as long as defendant has failed to successfully complete full term of original probation) ("[W]e hold that when a trial court has determined that a probation violation has occurred, it possesses the authority to: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining period of probation for as much as an additional two years." ).

<sup>3</sup>Ms. Stringfield testified that she did not know what amount per month the defendant had been ordered to pay upon the reinstatement of her probation in 1998. The trial court stated, however, that, according to records supplied by his court clerk, the defendant had been ordered to pay \$30 per month. The records to which the trial court referred are not included in the record on appeal.

restitution payments during that time, telling Ms. Stringfield that she was unable to both pay her bills and make restitution. Ms. Stringfield testified she went on maternity leave at about the time the defendant's employment at Shiloh ended. She said when she returned in January the still-unemployed defendant told her she had been trying to find work but that it had been difficult because her car was broken down and it was hard to "get around and take care of her kids too." Ms. Stringfield acknowledged on cross-examination that the defendant had reported to her on schedule and agreed that her failure to pay restitution was her only probation violation.

The thirty-three-year-old defendant, Bernita Hogan, testified that she was a high school graduate. She said she had two children, ages one and four, who lived with her in a house trailer, for which a portion of the rent was paid by the Housing Authority. Her expenses included \$122 per month for rent, a monthly utility payment, which had been \$143 that month, and payments made "when [she could] pay it" for a loan she had obtained through Security Finance. Neither she nor her children had any health problems. The father of one of her children was deceased. The father of her other child had just been released from jail and provided financial support if she needed it, but was not under any court order to do so.

The defendant stated that she had earned \$6.00 per hour at her job at Shiloh, which she had obtained through a temporary service but which ended in August 2001 when she was laid off. She had drawn unemployment benefits from October to January, and had been drawing Aid to Families with Dependent Children ("AFDC") from January until March, when she had started her job at Fiesta Grill.<sup>4</sup> She said her unemployment check had been \$109, and her AFDC check had been \$185, but did not specify whether these amounts were per week or per month. She testified she had also received a food stamp allotment during that time, which had ranged from a high of \$200 to a low of \$118. Currently she was working eight hours a day, seven days a week, in the "welding department" [sic] of Fiesta Grill, earning \$7.90 per hour.

The defendant said she had worked at "Premdor" from August 2000 until she was fired in June 2001, and that by the time she was fired she had been making \$7.50 per hour. Complications with her last pregnancy had prevented her from working for three or four months prior to her employment at Premdor and she had relied on her AFDC income during that period of time. The defendant testified she had used the first paycheck from her new job to make a \$25 restitution payment on March 22, a few days before the probation revocation hearing, and that she thought she had also made \$25 payments in October and February. Asked to explain the lengthy periods of time during which she had not made any payments, she replied: "I had other bills I was paying, trying to pay rent, trying to keep a place to live for me and my kids and groceries. This was before I was getting my food stamps like that, you know."

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<sup>4</sup> Although the defendant's testimony at this point in the hearing implied she had received AFDC only during the period between January and March, her later testimony made it clear that she was still receiving AFDC checks for her younger child and that she had received them for her older child for at least some period after the child's birth.

The defendant testified on cross-examination that she had been fired from Premdor because she had gotten into an argument with a coworker, who had more seniority. She acknowledged that both her children had been born out of wedlock while she was on probation. She had not tried to get court-ordered child support from either father; but, since April 2001, she had been receiving \$175 per month in social security benefits based on the death of her older child's father and received AFDC support for the younger child. In addition, the younger child's father and his mother helped her financially whenever they were able. The defendant testified she did not want to go to jail and that, given another chance, she would make restitution payments when she could. She testified on redirect that her brother, who was the beneficiary of her mother's estate and the recipient of her court-ordered restitution, helped her financially when he was able.

Upon questioning by the trial court, the defendant acknowledged that when she was charged with violation of probation for nonpayment of restitution in 1998, the trial judge had ordered that she go to prison. She said the judge had, however, called her back that same evening and "reinstated [her]." She admitted she had been in jail in 1998 on drug charges that had been dismissed for failure to prosecute. She had also spent several months in jail in 1998 and 1999, serving a portion of an eleven month, twenty-nine day sentence on a conviction for passing worthless checks.

At the conclusion of the hearing, the trial court found that the defendant had violated the terms of her probation not only by her failure to pay restitution but also by her arrest for drug charges and her conviction for passing worthless checks. The court further found that, given her history, the defendant would not pay restitution in the future. The court therefore revoked her probation and ordered that she serve her original four-year sentence in incarceration.

### **ANALYSIS**

The defendant contends the trial court abused its discretion in revoking her probation for failure to pay restitution. She argues that the trial court did not make the required finding that her nonpayment was willful, and that there is insufficient evidence to support such a finding. The State contends the trial court clearly found that the defendant's failure to pay was willful and that the record supports its finding.

A trial court is granted broad authority to revoke a suspended sentence and to reinstate the original sentence if it finds by the preponderance of the evidence that the defendant has violated the terms of his or her probation and suspension of sentence. Tenn. Code Ann. §§ 40-35-310, -311 (1997). When the defendant's violation of probation is based on failure to pay restitution or fines, the trial court must determine the reasons behind the failure to pay. State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986). If the court finds the nonpayment results from either the defendant's willful refusal to pay or failure to make bona fide efforts to obtain the means to pay, the defendant's probation may be revoked. Id. However, if the trial court finds that the nonpayment results from a genuine inability to pay, the court may not revoke the defendant's sentence and order incarceration unless alternative measures are inadequate to meet the State's needs in punishment and deterrence. Id.

The revocation of probation lies within the sound discretion of the trial court. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Stubblefield, 953 S.W.2d 223, 226 (Tenn. Crim. App. 1997); State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). To show an abuse of discretion in a probation revocation case, “a defendant must demonstrate ‘that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred.’” State v. Wall, 909 S.W.2d 8, 10 (Tenn. Crim. App. 1994) (quoting State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). The proof of a probation violation need not be established beyond a reasonable doubt; it is sufficient if it allows the trial court to make a conscientious and intelligent judgment. Harkins, 811 S.W.2d at 82 (citing State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984)). We review this issue, therefore, under an abuse of discretion standard.

The defendant argues that the trial court made no finding that her nonpayment was willful. Such a finding, however, was implicit in the trial court’s finding that the defendant had “thumbed her nose” at the probation system, making no effort to comply with the conditions of her probation. The trial court stated the following:

Let me tell you what the totality of the circumstances is; since she’s been on probation, she’s had two kids by two different men, spent a long time in jail on a drug charge, spent time in jail on bad check charges. She’s thumbed her nose at this system. Now that’s the time she’s been on probation. That’s the time when she’s supposed to be, a term I don’t like to use, she’s supposed to be living at the foot of the cross. During that time that she’s supposed to be living at the foot of the cross, this is all the things she’s done.

And you talk about thumbing your nose at the probation system; she’s done it. I ain’t [sic] not going to do anything you tell me. It’s not just the \$7,000.00 we’re talking about here. She’s done everything except be a good probationer. I mean hadn’t done anything, did the opposite.

In that period of time she’s gone on food stamps, she’s drawing AFDC, she’s drawing social security by a deceased boyfriend who she had a baby by, so it’s not just the \$7,000.00.

If we leave her out four more years, I don’t know what in the world she’ll do. She’s liable to rob a bank. I don’t think I’ve got much choice in this case at all.

I know [the assistant district attorney general] said she’d be satisfied by not locking her up, but I don’t know whether I am or not.

I don't think she's capable of staying out here unless she messes up. Every way she turns, she messes up.

Now has anybody in this courtroom ever heard anybody doing as much as she did on probation and not serve the time? I mean everybody has bent over backwards for her and she don't appreciate it, she don't care, and I think we've got other people we can deal with and may help.

You all know I don't mind probation, in fact I kind of like it. But we've got people back there right today probably go on probation, they're going to say, boy if I could act like she does, you could put me on probation every day of the week. That ain't [sic] bad, she's spent time in jail, she's fooled with drugs, she's had two illegitimate children by two different men. Probation must not be that bad in Dickson County. I mean you know, what kind of message are we sending out? I don't have any choice, I'm going to let her serve her time.

We also disagree with the defendant's contention that the record does not support a finding that her nonpayment was willful. In reviewing her record of payment, the trial court made the following observation: "It's obvious you're not going to pay. Here's your record; '94 you paid \$50.00, all of '95 you paid \$425.00, in '99 you paid \$85.00, 2000 you paid \$190.00, 2001 you paid \$170 and this year you paid \$25.00." Thus, the record reflects that the defendant failed to regularly pay her reduced monthly restitution payments of \$30 not only during the time she was unemployed, but also during periods of employment. She earned \$6.00 per hour at Shiloh during July, August, and September 2001, and yet, according to Ms. Stringfield, made no payments toward restitution during that time. From August 2000 through June 2001 she earned as much as \$7.50 per hour at Premdor, but the total of her payments in both 2000 and 2001 amounted to only about half of what she had been ordered to pay. Moreover, the defendant's own testimony indicates that at least one of her periods of unemployment resulted not from a downturn in the economy or the conclusion of her temporary assignment, but from her own misbehavior in getting into an argument with a coworker at her place of employment.

Such a history supports a finding that the defendant's nonpayment was the result of either a willful refusal to pay or a failure "to make sufficient bona fide efforts legally to acquire the resources to pay." Dye, 715 S.W.2d at 40 (quoting Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2064, 2073, 76 L. Ed. 2d 221 (1983)). Furthermore, given the defendant's history and her testimony at the hearing, the record does not preponderate against the trial court's finding that she would be no more likely to comply with the conditions of her probation in the future than she had been in the past. Accordingly, we find no abuse of discretion by the trial court in revoking the defendant's probation and ordering that she serve her full sentence in confinement.

### **CONCLUSION**

Based upon the foregoing reasoning and authorities, we affirm the judgment of the trial court.

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ALAN E. GLENN, JUDGE